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In The

Supreme Court of the United States

October Term, 1932.

No. 888

FRANK E. COOPER, As Trustee of Wauchula Central Pharmacy, Inc., a Bankrupt,

Petitioner,

v.

R. F. DASHER,

Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT OF FACTS.

This case was orally argued before the Circuit Court of Appeals for the Fifth Circuit on the 21st day of February, 1933, by the attorney who brings the petition for certiorari to this court (R. p. 55). The appeal to that court had been pending for a long time. Under the rules that court would have heard and determined the appeal

had the appellant in that cause filed no brief. The appellee was not entitled as a matter of right to a copy of appellant's brief without making an application therefor to the clerk of that court at New Orleans, La. His failure to make his application was perhaps due to the fact that the writer of this brief personally delivered to him at Tampa, Florida, a true, typewritten copy of R. F. Dasher's brief on the 9th day of February, 1933, which was at least twenty-four hours sooner than he could have received a copy of the brief after application through the ordinary course of the mails had the appellant filed his brief in the Circuit Court of Appeals on the date which the petitioner herein contends it should have been filed. We contend that this is a trivial matter to submit to this court. If the rules and practice of the Circuit Court of Appeals are unfair, the petitioner herein has not chosen the proper method to correct them.

Most of the stock of goods of the estate of the bankrupt, Wauchula Central Pharmacy, Inc., was purchased jointly at private sale from the petitioner herein at 60 per cent of their own appraisal by two creditor corporations whose employees jointly appraised the goods. While he is in contempt of court the respondent can bring no action to compel the return of these goods to the bankruptcy court. This presumable fraud having been discovered after the turnover order, we submit that under the ruling of this court in the *Perla case, infra,* no testimony is admissible before the District Court, or elsewhere, to establish the fraud or discrepancy until the turnover order is vacated.

The referee in bankruptcy in the instant case failed or neglected to appoint three disinterested appraisers to appraise any of the property of the bankrupt estate until October 19, 1932, more than ten months after the turnover

order and more than eighteen months after practically all of the property of the bankrupt estate had been disposed of. The official appraisers valued the remaining goods at $30.00 without attempting to appraise the other merchandise of the bankrupt which the referee estimated should have been $49,495.81 (R. p. 25).

The contention of the respondent in contempt is that the deficiency of $19,157.66 was caused by the failure of the trustee in bankruptcy (previously receiver) to have the property legally appraised by three disinterested appraisers in accordance with Section 70-b of the Bankruptcy Act, and the sale of the goods under circumstances similar to those frowned upon in the case of *In re Frazin & Oppenheim, 181 Fed. 307 (C. C. A. 2nd Cir.)*.

ARGUMENT.

I.

After reading the decisions cited by the petitioner, we are inclined to believe that the purported conflict between the various Circuit Courts of Appeals complained of by the petitioner is more anticipated and imaginary than real. A careful reading of the turnover order of the referee in bankruptcy (R. pp. 24-28) and the opinion of the Circuit Court of Appeals for the Fifth Circuit in the instant case clearly indicates that with reference to the "unidentified and unidentifiable merchandise 'of a cost value of $19,157.66,' " the turnover order of the referee in bankruptcy was reversed because:

(1) The referee did not first determine that the respondent had the goods in his possession at the time of the order or that he was presently able to comply with it.

(2) The property ordered to be turned over was insufficiently described.

The first contention by the petitioner herein that the question presented before this court is "single" is therefore not borne out by the record and needs no argument (R. pp. 56-60).

II.

That portion of the turnover order specifically describing the goods mentioned therein is not questioned before this court because the respondent has since the turnover order found these goods, or practically all of

them, in the actual possession of good and respectable citizens who actually purchased same before the bankruptcy in the present case. His more serious dilemma concerns the undescribed goods.

The petitioner admits that the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in harmony with the decisions of the Ninth Circuit and apparently concedes that it is in harmony with the Circuit Court of Appeals for the First Circuit. The respondent respectfully submits that the petitioner in his brief is mistaken in his statement that the decision of the Circuit Court of Appeals for the Fifth Circuit in the instant case is in conflict with the controlling decisions of the Second and the Third Circuits on the question of the sufficiency of the description of the goods in the turnover order.

We have read all the cases from the Circuit Courts of Appeals cited in the petitioner's brief from pages 15-21, inclusive. We find that in none of those cases was the question as to the sufficiency of the description of the merchandise involved in the turnover order discussed in the written opinions by the respective Circuit Courts of Appeals, except in the lone case of *Kirsner v. Taliaferro, 202 Fed. 51 (C. C. A. 4th Cir.)*. Under the peculiar circumstances of that case the insufficiency of the description of the merchandise may not have been seriously urged or may not have seriously affected the rights and liberty of the litigants. That court seemed to treat the matter of little or no importance and disposed of the question in one short sentence without reason or precedent. Apparently the main controversies in that case were all foreign to the point raised here. No mention is even made of the sufficiency of the description in the headnotes or syllabus of that case. We, therefore, con-

tend that the case of *Kirsner v. Taliaferro, supra,* is not a *controlling* decision on the question involved herein in any circuit.

In the lonesome case of *In re Cohan, 41 Fed. (2) 632 (C. C. A. 3rd Cir.),* we note that petitioner has resurrected a copy of the transcript in that case and actually found that there was an assignment of error in that case on the insufficiency of the description of the property. However, that case was decided on entirely different grounds, and that particular assignment was apparently waived or abandoned because the opinion of the court does not even mention it.

We have also studied the written opinion of this court in the case of *Perla v. Hubshman, 278 U. S. 358, 73 L. Ed. 419,* and the written opinion of the Circuit Court of Appeals for the Second Circuit in that case, *23 Fed. (2) 413.* Evidently the question as to the sufficiency of the description of the property involved in the turnover order was never raised in the Circuit Court of Appeals or in this court in the *Perla case* because no mention of same is found in either of the opinions. It is therefore a matter of conjecture as to what decision the Second and Third Circuit Courts of Appeals would have made concerning the single matter sought to be reviewed here by the petitioner had such a question been fairly presented and urged before those courts.

What we have just stated is supported by the Circuit Court of Appeals for the Ninth Circuit in the recent case of *In re Miller & Harbaugh, 54 Fed. (2) 612 at page 616,* wherein that court said:

> "The only case we have found, none is cited, in which it is directly held in the face of an objection raising the question that the description of property

such as contained in the order under consideration in the case at bar was sufficiently definite and certain to sustain a commitment for contempt, is the case of *Kirsner v. Taliaferro, supra.*"

CONCLUSION.

We contend that any other decision than that rendered by the Circuit Court of Appeals for the Fifth Circuit in the instant case would facilitate frauds and oppressions on the part of persons trusted to administer bankrupt estates. Any other decision would be tantamount to imprisonment for failure to satisfy an order in the nature of a money judgment. Any other decision would resurrect from the dark ages that infamous and indefensible trial by ordeal to determine whether the victim could pay $19,157.66, not contemplated by the Bankruptcy Laws or the Constitution of the United States. Unless the property is described the turnover order of a referee in bankruptcy is not clothed with as much respectability as a proceeding to jail a defendant for debt upon a common law judgment where the creditor plaintiff secures a judgment after refusing to itemize or notify the debtor as to the account sued upon.

Of course defendants may waive proof and often confess judgments or allow judgments by pro confesso or default and waive their rights by refusing to defend the suit. That is not true in the instant case where the respondent is only temporarily released after serving 104 days in the common jails under the turnover order, while none of the alleged missing goods can, or have been, found. He can ill afford to abandon or waive his assigned errors on the part of the referee in bankruptcy in the instant case.

It is bad enough that the opinion or decision of only one man may take away the liberty and reputation of another. But a legal system that would permit or impose upon a referee or judge the responsibility of taking the property, reputation and liberty of another citizen on guesswork, estimation and speculation is inimical to our plan of Government. If the referee in the instant case will describe the goods in his order whether they be toilet articles or sandwiches, the respondent may be enabled to trace them to *bona fide* purchasers before (or after) bankruptcy as he has since been able to do with regards to the small list of specifically described goods.

The Circuit Court of Appeals for the Fifth Circuit correctly held that under the turnover order in the instant case, *"the respondent himself could not safely undertake to comply with it, nor could any officer of the court safely compel him."*

We, therefore, contend that a careful reading of the opinions of the Circuit Courts of Appeals cited by counsel for the petitioner for certiorari in the instant case will disclose that he is presenting a hypothetical conflict and moot question to this court. There is no real conflict between the decisions of the Circuit Courts of Appeals on the questions involved in the instant case. This court has held on numerous occasions that it would not lend its aid to the decision of moot and anticipated questions. *United States v. Hamburg-Amerikanische Company, 239 U. S. 466, 60 L. Ed. 387 at page 391.*

Respectfully submitted,

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